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No. 555

IN THE

Supreme Court of the United States

October Term, 1956

AMERICAN AIRLINES, INC.,
Petitioner,

v.

NORTH AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1956

No. 635

AMERICAN AIRLINES, INC.,

Petitioner,

v.

NORTH AMERICAN AIRLINES, INC.,

Respondent.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

Petitioner seeks review of a decision of the United States Court of Appeals for the District of Columbia Circuit which modified an order of the Civil Aeronautics Board. The decision by the lower court was unanimous.

NO REASON EXISTS TO INVOKE THIS COURT'S JURISDICTION

The lower court made its decision in conformity with the well-settled legal principles established by this Court. The decision below does not conflict with any federal court decisions on this matter; nor did the lower court depart from the accepted course of judicial proceedings.

"A review on writ of certiorari . . . will be granted *only* where there are *special* and *important reasons* therefor." Emphasis added. Rule 19(1). Here, there is no reason for granting the writ.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, not yet reported, appears at pages 481-482 of the record.

The opinion of the Civil Aeronautics Board appears at pages 199-211 of the record, and the dissenting opinion of one Board Member appears at pages 211-218 of the record. The initial decision of the hearing examiner appears at pages 183-199 of the record.

QUESTION PRESENTED

There is only one, quite simple question presented:

Whether the lower court, reviewing a final decision and order of the Civil Aeronautics Board and the evidence in support thereof has the power to modify the scope of the order after determining that the evidence did not support all of the findings of the Board even though the respondent did not specifically raise an objection thereto, either before the Board or before the lower court of appeals, but where the Board recognized the issue, and considered and determined it in the Board's final decision and order under review.

STATUTES INVOLVED

The pertinent parts of Section 1006 of the Civil Aeronautics Act, 52 Stat. 1024, as amended, 49 U.S.C. § 646, are as follows:

> "(d) . . . the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the [Civil Aeronautics] Board . . . ."
>
> "(e) . . . No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so."

Section 411 of the Civil Aeronautics Act, 52 Stat. 103, as amended, 49 U.S.C. § 491, reads as follows:

> "The [Civil Aeronautics] Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition."

STATEMENT

Respondent originally incorporated on May 4, 1946, as Twentieth Century Airlines, Inc., in the State of North Carolina, holds a letter of registration as a large irregular air carrier issued in that name by the Civil Aeronautics Board on July 22, 1947. R. 171. On April 21, 1951, respondent began engaging in air transportation under the trade name North American Airlines and North American, and on March 3, 1952, by an amendment to its certificate of incorporation, respondent changed its name to North American Airlines, Inc. R. 171.

By a letter dated March 11, 1952, addressed to the Civil Aeronautics Board, respondent advised the Civil Aeronautics Board of the change of its corporate name and suggested a reissue of its letter of registration in that name. R. 171-172. At that time there was no Board regulation which purported to control or regulate the name under which a carrier might operate, and no regulation requiring Board approval or permission to change a car-

rier's name. The Board did not reply to respondent's letter of March 11, but more than five months later, on August 19, 1952, it adopted Regulation ER-178, being Amendments No. 7 to Part 291 of its economic regulations under which it made it an express condition upon the operating authority granted to each large irregular air carrier, that unless otherwise authorized by the Board, such air carrier shall not hold out to the public and perform air transportation services in any name other than that appearing on its letter of registration. 14 C.F.R. §291.28, at R. 295-298.

In the introductory comment of its new regulation the Board states that where good will has been established in a name, the Board will deny permission to use that name only where, after notice and opportunity for a hearing, it is established that such use constitutes a violation of Section 411 of the Civil Aeronautics Act of 1938, 52 Stat. 1003, as amended, 49 U.S.C. § 491. R. 295-297.

On October 6, 1952, respondent in accordance with the requirements of the new regulation, applied to the Board for authorization to conduct its operations under its proper corporate name, *i.e.*, North American Airlines, Inc. R. 1-3. After respondent filed said application, petitioner [1] filed a memorandum with the Civil Aeronautics Board, claiming service mark infringement and unfair competition. R. 186. By its Order E-7107, adopted on January 28, 1953, the Civil Aeronautics Board instituted an investigation, C.A.B. Docket No. 7928, to determine whether respondent in using its comporate name and derivitaves thereof in air transportation, "have been and is" violating Section 411 of the Civil Aeronautics Act, *supra*. R. 3-6. The said order consolidated for hearing

[1] Petitioner is an air carrier which together with its predecessor company, American Airways, Inc., has been continuously engaged in air transportation since 1930. R. 171.

together with the investigation proceeding, respondent's application, C.A.B. Docket No. 5774. R. 5-6. By Board Order No. E-7174, dated February 14, 1953, petitioner was permitted to intervene. R. 186.

The enforcement attorney for the Civil Aeronautics Board produced no witnesses and no evidence of any kind during the entire course of the hearing. For all practical purposes, he participated only as an observer. The only evidence produced against respondent was that produced by petitioner through its employees. R. 416.

The Civil Aeronautics Board found that the use by respondent of its corporate name, derivatives of that name, "or any combination of the word 'American' violated Section 411 of the Civil Aeronautics Act, *supra*, and ordered respondent and its agents to cease and desist from engaging in air transportation under its corporate name, derivatives thereof "or any combination of the word 'American'." R. 210-211, 229-230.

Relative to the evidence in the proceeding before the Civil Aeronautics Board, the lower court stated in its prior decision:

> "The Board rejected, and decided it 'need not comment' upon, its Examiner's finding:
>
> 'There is no evidence of record that North American adopted its name with intent to deceive the public or trade upon the good-will and business reputation of American, or that American has been injured by such operation . . .' [R. 197].
>
> Our examination of the record demonstrates that the Examiner was correct." 228 F. 2d 432, 436.

Although respondent did not specifically raise the issue, the Civil Aeronautics Board itself recognized and considered the issue as to whether respondent should be ordered to cease and desist engaging in air transportation under any other name which includes the word "Amer-

ican." R. 208, 210-211. In fact, such a sanction upon respondent was so controversial that it caused one Board Member to indicate in his dissent, strong disapproval of the sanction which absolutely prohibited respondent from using " 'American' in any way in its business name." R. 217.

The lower court, on remand from this Court, modified the Board's order stating:

> " . . . . we set aside the order of the Board insofar as it orders petitioner to cease and desist engaging in air transportation under any other name which includes the word 'American.' " R. 482.

The Government did not petition for writ of certiorari.

ARGUMENT

The decision below accords with the decisions of this Court and of the other courts of appeal. The tenuousness of petitioner's petition is best illustrated by the fact that it has cited *Federal Power Commission* v. *Colorado Interstate Gas Company*, 340 U.S. 492 (1955), as a case in "conflict" with the lower courts decision in the instant case. Pet. at 14-15.

The gas company in that case simply did not make an application for a rehearing to the Federal Power Commission with respect to the issue subsequently considered by the court of appeals, which application was *required* under Section 19(a,b) of the Natural Gas Act, 52 Stat. 831, 15 U.S.C. § 717r(a,b), before the court of appeals could consider the objection. As this Court said in the *Colorado Interstate Gas* case, *supra* at 498, 500:

> " . . . Respondent's error appears on the face of the statute. Section 19(a) first precludes the *bringing* of any proceeding in a Court of Appeals to review an order of the Commission, *unless the person bringing it previously has applied to the Commission for a rehearing on that order.* Section 19(b) then expressly

precludes the *consideration* by the court of any objection to an order of the Commission, *unless the objection shall have been urged before the Commission in the application for rehearing.* . . ."

* * * * *

"Furthermore, § 10 [of the Administrative Procedure Act], by its own terms, is made applicable in 'so far as (1) statutes [as in the Natural Gas Act] preclude judicial review' . . ." The Court's emphasis.

The Civil Aeronautics Act unlike the Natural Gas Act, does *not* require an application for rehearing or reconsideration of an order otherwise final. Petitioner in this case has never questioned and indeed, cannot question that the order under review was a final order. The Board's rule with respect to reconsideration is permissive only, and as noted, Rule 37, "neither the filing nor the granting of such a petition shall operate as a stay of such final order unless specifically so ordered by the Board." 14 C.F.R. § 302.37 (1953). There is no conflict between the lower court's decision and this Court's decision in the *Colorado Interstate Gas* case, *supra*. The *Gas* case, *supra*, is just not applicable.[2]

There is no question that the Civil Aeronautics Board had an opportunity to and did consider and determine the issue raised by the court of appeals below. The Board recognized and considered the issue, imposing a sanction upon respondent so grave that it caused one Board Mem-

[2] It is worth noting that in FPC v. Colorado Interstate Gas Co., 348 U.S. 492 (1955), the condition in the certificate of the gas company which was subsequently objected to by that company before the court of appeals had been proposed and acquiesced in by the gas company. The FPC had no reason to believe that the validity of the condition was contested by the gas company. The validity of the condition was not considered or determined by FPC during the hearing. Such are not the facts in the instant proceeding where the issue was recognized, considered and decided by the CAB. R. 208, 210-211, 217. Not even petitioner in the instant proceeding can deny this.

ber to indicate in his dissent, strong disapproval of the sanction which absolutely prohibited petitioner from using "American" in any way in its business name.[3] Upon such facts, the law is clear that the reviewing court has the power to modify the scope of the Civil Aeronautics Board's order. *Hormel* v. *Helvering*, 312 U.S. 552 (1941); *Mulligan* v. *Andrews*, 93 U.S. App. D.C. 375, 211 F. 2d 28 (1954); *Phillips* v. *Security Exchange Commission*, 156 F. 2d 606 (2d Cir. 1956); *cf. W. R. Grace & Co.* v. *Civil Aeronautics Board*, 154 F. 2d 271, 286 (2d Cir. 1946) (and Supreme Court cases cited therein).

The cases cited by petitioner to support a contrary view, in fact, support the action taken by the lower court in this proceeding.[4] In all of those cases cited by petitioner, pages 15-18, the issue in question had never been raised before the administrative agency, or considered and deter-

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[3] R. 208, 210-211, 217. Under the rule of Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), it is the duty of the appellate court to examine the record as a whole in order to determine whether the evidence supporting an order of an administrative agency is substantial. "[W]e think the evidence supporting the conclusion [of the administrative agency] may become even less substantial when it fails to persuade an experienced member of the Commission who dissents from its findings and conclusions." Minneapolis-Honeywell Reg. v. FTC, 191 F. 2d 786 (7th Cir. 1951).

[4] United States v. L. A. Tucker Truck Lines, 344 U.S. 33 (1952); United States v. Capital Transit Co., 338 U.S. 286 (1949); Unemployment Compensation Commission of Alaska v. Aragon, 329 U.S. 143 (1946); NLRB v. Cheney Lumber Co., 327 U.S. 385 (1946); NLRB v. Seven-Up Co., 344 U.S. 344 (1953); Marshall Field & Co. v. NLRB, 381 U.S. 253 (1943); May Stores Co. v. NLRB, 326 U.S. 376 (1945).

Contrary to what petitioner would like this Court to believe, the lower court's action in the instant proceeding does not conflict with the decision of the Ninth Circuit in Western Airlines v. CAB, 196 F. 2d 933 (9th Cir. 1952). Pet. at 16-17. In the Western Airlines Case, *supra*, the Board had not considered and determined the particular issue subsequently raised before the Court of Appeals. As has been demonstrated, this is not the situation in the present case. R. 208, 210-211, 217. It is the facts, not the law, which are in conflict.

mined by it. Such a condition is materially different from the factual circumstances in the present case. In the present proceeding, the Civil Aeronautics Board had recognized the issue, had considered, controverted, and determined the question in its final decision. R. 208, 210-211, 217. Under such circumstances, there is no question of the lower courts power to modify the order as it did. See Argument, *supra* at 8.

Petitioner also contends that the decision of the lower court conflicts with other federal courts of appeals decisions, and has improperly interfered with the exercise of an agency's discretion in the choice of remedy through the use of dissimilar bodies of law. Again, this is not the case. The lower court's action in modifying the order of the Civil Aeronautics Board conformed to the principles well-established by this Court and in no way conflicted with decisions of other courts of appeal. The Supreme Court in Federal Trade Commission cases, has repeatedly expounded the principle that "complete excision" of an established trademark or trade name should not be ordered if a less drastic remedy would suffice to safeguard the public against confusion. The Supreme Court in *Federal Trade Commission* v. *Royal Milling Company*, 288 U.S. 212 (1933), in a decision which was left undisturbed in this regard by the Supreme Court's more recent decision in *Jacob Seigel Company* v. *Federal Trade Commission*, 327 U.S. 608 (1946), said at page 217:

> " . . . The orders should go no further than is reasonably necessary to correct the evil and preserve the right of competitors and public; and this can be done, in the respect under consideration, by requiring proper qualifying words to be used in immediate connection with the names."

In the *Seigel* case, *supra*, which case petitioner repeatedly cites, the Supreme Court reaffirmed the ruling of the *Royal Milling Case*, *supra*, by emphasizing that under the express words of Section 5 (c) of the Federal Trade

Commission Act, 38 Stat. 719, as amended, 15 U.S.C. § 45 (c), the reviewing court had the power to modify the order of the Commission. In the *Seigel* case, *supra*, as in this case, one of the members of the administrative agency wrote a dissenting opinion in which the majority order was criticized as being too harsh. R. 217. In the *Seigel* case, *supra*, as in the present case, the reviewing court had express statutory authority to modify the order of the administrative agency.[5] Respondent submits that the lower court, under the factual circumstances, and under law propounded by this Court, had the power and duty to modify the order of the Civil Aeronautics Board. The cases cited by petitioner do not support a contrary view.[6]

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[5] Section 1006 (d) of the Civil Aeronautics Act, 52 Stat. 1024, 49 U.S.C. § 646 (d); Section 5 (c) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. § 45 (c).

[6] Petitioner, in an attempt to establish that a conflict of decisions exist between that of the lower court and other courts of appeals, cite: Galter v. FTC, 186 F. 2d 810 (7th Cir. 1951); Gold Tone Studios, Inc. v. FTC, 183 F. 2d 257 (2d Cir. 1950); Pep Boys—Manny, Moe and Jack, Inc. v. FTC, 122 F. 2d 158 (3d Cir. 1941); FTC v. Real Products Corp., 90 F. 2d 617 (2d Cir. 1937); Juvenile Shoe Co. v. FTC, 289 Fed. 57 (9th Cir. 1923). Again, however, it is not the law but the facts which are in conflict. Except for one, in each of the said cases cited by petitioner, the element of strong and deliberate deception or passing off was present. Such is not the case in the instant proceeding. See Statement, *supra* at 5.

In the Gold Tone Studios Case, *supra*, where deliberate deception and passing off was not involved, the court of appeals for the Second Circuit *modified* the scope of the remedy which the administrative agency had proscribed.

CONCLUSION

The decision of the court below is correct. The petition for a writ of certiorari presents no question warranting further review and should therefore be denied.

Respectfully submitted,

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January 16, 1957